



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 4372-02
2 December 2002

[REDACTED]

This is in reference to your request for further consideration of your original application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552, and your new request for correction of your record to show that you have served on active duty continuously since 29 March 1997.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 15 November 2002. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, record of the Board's consideration of your initial application, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by the Director, Naval Council of Personnel Boards (NCPB) dated 27 August 2002, a copy of which is attached, and your comments in response thereto.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, it affirmed its decision of 7 October 1999, and substantially concurred with the comments contained in the advisory opinion from the Director, NCPB.

With regard to your request for restoration to active duty effective 29 March 1997, the Board was not persuaded that you were not fit for release from active duty on that date, or that you were unfit for duty during the 30 March 1997-10 January 1999 period. It noted that you underwent a physical examination on 25 March 1997, and were found physically qualified for "separation from ADSW." You completed a Standard Form 93, Report of Medical History, in which you stated that your health was "fair" at that time. Although you denied a history of "recurrent back pain", you disclosed a two month history of a lower back ache, with intermittent relief. That condition was not considered disqualifying by the examining physician. The Board noted that you received a fitness report for 29 March-30 November

1997 period which contains the comment that you were "always a first class PFT performer." You apparently felt that you were in good physical condition during a substantial portion of the period in question, as you completed a Annual Certificate of Physical Condition on 10 January 1999, in which you denied having had any injury, illness or disease in the past 12 months which required hospitalization or caused you to be absent from school, duty or civilian occupation for more that 3 consecutive days; having been under a physician's care or having taken prescription medications in the past 12 months; or having any physical defect(s) which might restrict your performance of active duty or prevent your mobilization.

Your objections to the findings and conclusions of the Director, NCPB, were carefully considered and found to be inapposite. You clearly suffered from a long standing degenerative condition of your spine. The genesis of that condition had little if any connection to your military service, and it was not was not incurred when you were entitled to basic pay. It appears that you failed to make full disclosure of the nature and effects of your back condition to Navy or Marine Corps officials after you underwent spinal disc surgery in 1990. Had you made full disclosure, the condition may have become subject of medical scrutiny, which would have jeopardized your continued service in the Marine Corps Reserve. In this regard, the Board noted you had you been referred for disability evaluation in 1990, you would have been evaluated under the physically qualified for service in the Marine Corps Reserve standard, which is much less stringent than the fitness for duty standard applied when a condition is incurred while the service member is entitled to basic pay. Your career may very well have been terminated at that point. The Board noted that although you suffered acute exacerbations of your back condition during periods of military duty in 1997 and 1999, you did not sustain any significant trauma to your spine during those periods, you were not "injured" , and there was permanent aggravation of the preexisting condition during those periods of military duty. The exacerbations of your condition, one which occurred when you reached for your laptop computer, and the other occurring the day following a period of vigorous physical exercise, were the natural result of the underlying degenerative disease process and your advanced age, and undoubtedly would have occurred regardless of your duty status.

The Board was unable to conclude that the presumption of fitness would have been overcome had your case been referred to the disability evaluation system in 1999 prior to your transfer to the retired reserve. In formulating his opinion, the Director, NCPB, looked beyond the period when you underwent an acute exacerbation of your condition, surgical treatment therefor, and a the period of convalescence which ensued. His conclusion that you would have been fit for duties appropriate to your grade and experience had your career continued beyond the period of convalescence is reasonable, and was accepted by the Board. The Board noted that the presumption of fitness was established for situations such as yours, where a service member continues to perform his military duties until beginning processing for mandatory separation or retirement, and then requests substantial disability benefits because of an inability to perform the same duties. It also noted that, under policy guidance published by the Director, NCPB, the deterioration of a preexisting condition coincident with non-disability separation or retirement must meet the "grave" standard applicable to acute

conditions of recent onset.

In view of the foregoing, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure



DEPARTMENT OF THE NAVY
NAVAL COUNCIL OF PERSONNEL BOARDS
WASHINGTON NAVY YARD
720 KENNON STREET SE RM 309
WASHINGTON, DC 20374-5023

IN REPLY REFER TO

5220

Ser: 02-14

27 Aug 02

From: Director, Naval Council of Personnel Boards
To: Executive Director, Board for Corrections of Naval
Records

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN THE CASE
OF [REDACTED]

Ref: (a) Your ltr JRE:jdh Docket No: 4372-02 of 13 Aug 02
(b) SECNAVINST 1850.4E
(c) SECNAVINST 1850.4D

1. This letter responds to reference (a) which requested comments and a recommendation regarding Petitioner's request for correction of his naval records. The Petitioner contends he should have been processed through the Physical Evaluation Board (PEB) system and he should have received a medical disability rating for his medical condition.

2. The Petitioner's case history, contained in reference (a), was thoroughly reviewed in accordance with reference (b) and is returned. The following comments are provided:

a. The Petitioner's record indicates he suffers from a congenital back condition, which consisted of the formation of an extra lumbar vertebra (L-6). This likely, predisposed the Petitioner to develop back-related symptoms that began prior to his entry on active duty. The condition manifested early in his U.S. Marine Corps career with right-sided Sciatica and eventually led to two lumbar disc surgeries in 1988 and 1999. The Petitioner's condition improved with appropriate treatment. He received a commendatory fitness report covering the period of 29 March through November 1997 and he received a "highly recommended for promotion" fitness report covering the 1 December 1997 through 30 September 1998 time frame. From a PEB perspective he remained fit for duty. Had the Petitioner not been required to retire by regulation, it would have been reasonable to expect, with treatment and convalescence healing, that he would have been able to continue his active duty service.

AUG 28 2002

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5) Was the condition incurred or aggravated while he was entitled to basic pay?

Ans. See answer to number 3.

6) Had he been referred for disability evaluation prior to his mandatory transfer to the retired reserve on 1 February 1999, was his condition such that the presumption of fitness detailed in paragraph 3305 of reference (c) would have been overcome?

Ans. No. The Petitioner required a second lumbar disc surgery with a follow-up procedure due to post-operative complications. Petitioner's history and available post-operative evidence suggests that with appropriate convalescence recovery he would have been able to continue his active duty service had he not been precluded from further retention prohibited by regulation.

7) Did his spinal condition contribute to an early termination of his military career?

Ans. No, assuming the term "early" refers to termination prior to eligibility for retirement benefits.

8) Did the condition amount to an acute, grave illness or injury?

Ans. No. This is the standard set in the Department of Defense Instruction 1332.38 and used in reference (c). The Petitioner's condition does not reach this level of acuity.

9) Was there a "serious deterioration" of a preexisting condition during the presumptive period?

Ans. No. There was an acute, significant deterioration of his condition that was at worst transiently "serious." To fulfill the intent of "serious deterioration," such deterioration would have to become "permanent" with at least a 60% VASRD rating (cf., ref(c)), which was not the case here.

Subj: REQUEST FOR COMMENTS AND RECOMMENDATIONS IN THE CASE
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10) Were there injuries to petitioner's spine during the 1 October 1996 through 31 March 1997 and 11 through 25 January 1999 periods?

Ans. No. Paragraph 2039 of reference (c) defines an injury as "damage or wound to the body, traumatic in origin." In both instances, relatively trivial trauma resulted in injuries, which were likely superimposed on a significant underlying intervertebral disc disease process.

d. The Petitioner's request to show that he served on continuous active duty since 29 March 1997 or 10 February 1999 is not a determination that falls within the purview of this command.

3. In summary, the Petitioner was likely presumed fit from a PEB perspective when he was released from active duty. There is insufficient evidence in the Petitioner's file to establish that his condition was serious enough to overcome the presumption of fitness rule. Accordingly, I recommend that the Petitioner's BCNR application be denied.

